No. 22,081

IN THE

United States Court of Appeals

For the Ninth Circuit

KAREN JEAN HYMER,
Defendant-Appellant,

vs.

BENJAMIN K. CHAI, and
VICTORIA LEILANI CHAI,
Plaintiffs-Appellees.

Upon Appeal from the United States District Court for the District of Hawaii

OPENING BRIEF OF DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the case under the provisions of Title 28 United States Code, Section 1332. The Defendant admits the jurisdiction of the District Court with respect to the claim of Mr. Chai, however, the Defendant denies jurisdiction of the Court with respect to the claim of Mrs. Chai as not reaching the required jurisdictional amount in controversy.

This Court has jurisdiction of the appeal under the provisions of Title 28 United States Code, Section

1291. This Court's jurisdiction has been obtained pursuant to the Federal Rules of Civil Procedure.

Plaintiffs' amended complaint alleged diversity of citizenship and an amount in controversy in excess of $10,000 for *both* plaintiffs (R. 39). The question of jurisdiction was an Issue of Law in the Pretrial Order (R. 33).

STATEMENT OF THE CASE

A. Introduction:

This is an action brought by Plaintiffs-Appellees (hereinafter referred to as Plaintiffs) to recover for personal injuries and general damages suffered as a result of an accident at an intersection of Kamehameha Highway and Lipoa Street in the City and County of Honolulu, Hawaii on September 20, 1965 as stated in the complaint, as amended (R. 3).

The complaint alleged negligence on part of Defendant and claimed general and special damages for the Plaintiff Mr. Chai for alleged injuries, in the amount of $75,000 and general damages for the Plaintiff Mrs. Chai for loss of society and companionship, etc., in the amount of $7,500 (R. 3-4).

An answer was filed by the Defendant setting forth the affirmative defenses of contributory negligence and assumption of risk (R. 8-9). In addition, a counterclaim was filed by the Defendant for damages of $453.12 as a result of the negligence of the Plaintiff (R. 12). An answer to counter-claim was filed, alleg-

ing contributory negligence on part of Defendant (R. 19).

The trial was commenced on February 20, 1967 with the Honorable Martin Pence presiding with a jury (Tr. 1). A verdict for the Plaintiff (R. 85) was returned on February 27, 1967 (Tr. 593) in the amount of $48,000 for Mr. Chai (Tr. 594) and $5,000 for Mrs. Chai (Tr. 594).

The Final Judgment (R. 88) was filed February 28, 1967 (R. 125). A Motion for New Trial (R. 90 et seq.) was filed March 8, 1967 (R. 125). The Motion for New Trial together with a new Motion to Amend the complaint filed by the Plaintiff (R. 99) were argued before the Honorable Martin Pence commencing on March 31, 1967 (R. 125). Both motions were denied on April 5, 1967 (R. 125). Notice of Appeal was filed by the Defendant on May 2, 1967 (R. 115).

B. Facts:

The accident giving rise to this action took place during morning rush-hour traffic September 20, 1965 (Tr. 188) on a heavily travelled route in the City and County of Honolulu, Hawaii. The Defendant was traveling toward Ewa (westbound) on this route, in an automobile (Tr. 466). The Plaintiff was headed toward Honolulu (easterly) on a motorcycle (Tr. 178-180).

At the intersection of this main route, Kamehameha Highway, and Lipoa Street, where a left-hand deceleration lane was provided in the median (Tr. 467),

Defendant entered the left-turn lane and stopped (Tr. 24).

Meanwhile, Plaintiff had been proceeding in the center lane, nearest the median, and in the last 1 or 2 miles preceding the collision, changed into the right hand lane, then back to the center lane, then back again to the right lane, then finally to a new outside lane (Tr. 242). The status or classification of this outside lane was in issue at the trial. Plaintiff described this outside lane as a third lane of the highway (Tr. 325). Defendant described the lane as a deceleration-acceleration lane for the Lipoa Street intersection (Tr. 492). Police officers and others testified at the trial, that at the time of the accident, the lane extended for 1/10th of a mile or less on either side of the intersection (Tr. 66).

Defendant had waited for several minutes in the left-hand turn lane, since opposing traffiic was heavy, and described as "stop-and-go" (Tr. 29). Finally, first the car in the center lane of opposing traffic, then another car in the adjoining opposing lane stopped, leaving the intersection clear (Tr. 29-30). Defendant then began a left-hand turn, at a speed testified to as less than 5 mph (Tr. 41).

Plaintiff was now proceeding down the outside lane at an admitted 32 mph (Tr. 182), although speed was in issue at the trial. The Witness Lawrence, himself a motorcyclist, testified that he could hear the Plaintiff's machine accelerating all the way down the lane until impact occurred (Tr. 149). The Witness Lawrence also testified that he could estimate the speed of

Plaintiff's vehicle at not less than 30 mph and possibly 40 to 45 mph (Tr. 154). The maximum posted speed limit was established at 35 mph (Tr. 86) at this point on the Highway. The Plaintiff's motorcycle struck the right side of Defendant's car, which was in transit across the third lane (Tr. 472), damaging the right front fender, the hood, and windshield (Tr. 475 and Exhibit C). The front of the motorcycle was demolished, and the motorcycle as a whole was damaged beyond economical repair (Tr. 224). The Plaintiff's body struck the windshield of Defendant's car (Tr. 489) and landed some distance away, with extensive injuries (Tr. 82). Neither party saw the other until the instant before impact (Tr. 185, 472). The extent of Plaintiff's injuries, and the reasonableness of costs of medical care were not contested (Tr. 4).

QUESTIONS INVOLVED

1. Did the Court err in allowing the claim of loss of consortium by Plaintiff's wife to proceed to judgment without jurisdiction of foundation in law?
2. Was it prejudicial error to exclude evidence offered to show Plaintiff's prior manner of driving his vehicle for the purposes of raising reasonable inferences that the manner of driving tended to contradict Plaintiff's testimony regarding attitude, state of mind and driving conduct?
3. Was it prejudicial error to exclude portion of Plaintiff's deposition from consideration by the

jury, where said portion related to Plaintiff's awareness of traffic conditions and to the credibility of Plaintiff as a witness?

4. Did the Court err in denying Defendant's Motion for New Trial, in the light of evidence of improper communications between the jury foreman and the Court Bailiff?

5. Did the Court err in denying Defendant's Motion for New Trial in light of a verdict not supported by the evidence?

6. Was it prejudicial error to deny Defendant's Motion for Mistrial after an improper question concerning a possible criminal conviction for traffic violation was asked of Defendant by the Plaintiffs' counsel in the presence of the jury?

7. Did the Court err in failing to control the final arguments of Plaintiffs' counsel which were misleading, confusing and referring to matters not in evidence?

8. Was it prejudicial error to refuse Defendant's Requested Instruction on the law regarding exercise of right-of-way at intersections?

SPECIFICATION OF ERRORS

1. **The Trial Court Erred in Allowing Mrs. Chai's Claim to Proceed to Judgment.**

The Court was without jurisdiction because the amount prayed in the complaint (R. 4) did not reach the jurisdiction minimum required by law.

The Defendant placed the matter of jurisdiction in issue in the answer (R. 8) and maintained the issue in the Pretrial Order (R. 33) under Issues of Law.

The claim of Mrs. Chai in the complaint, number 4 (R. 4), fails to state a claim for which relief may be granted as a matter of law:

> "5. As a result of Defendant's negligence, Plaintiff Victoria Leilani Chai was deprived of the services of her husband, Benjamin K. Chai, and her comfort and happiness in his society and companionship have been impaired, all to plaintiff Victoria Leilani Chai's damage in the sum of $7,500."

2. It Was Prejudicial Error to Exclude Evidence Offered to Show the Plaintiff's Prior Manner of Driving.

Plaintiffs' counsel, anticipating the line of questioning which would have followed of the Witness Lawrence, asked for a bench conference (Tr. 123) where the following occurred:

> "Mr. O'Connor: It is my understanding that Mr. Gould is going to elicit from this witness certain evidence concerning Mr. Chai's driving of a motorcycle on Kam Highway that day somewhere, some distant point from this accident, and he is going to try to show that Mr. Chai was in fact violating a traffic ordinance somewhere back in Pearl City.
>
> The Court: Is that correct?
>
> Mr. Gould: Somewhere back before Pearl City.
>
> The Court: Well, somewhere before this.
>
> Mr. Gould: Some distance before this, yes.
>
> Mr. O'Connor: The cars had stopped on the highway and Chai cut in between two cars along

the center line of the highway and then came back into the traffic lane. And I understand this is a violation of a section of the Traffic Code.

Mr. Gould: There was no question of it being a violation——

The Court: What is your offer of proof here? If this witness is asked a question what he observed Chai doing one-quarter, one-half or one mile before this point, what is your offer of proof —what the answer would be?

Mr. Gould: Well, his testimony will be that Chai passed him first on his right when there was a 3-lane highway; that shortly it came into a 2-lane highway, that Chai went in front of him and passed in between two lanes of traffic and then went ahead of two other cars, and then proceeded.

The Court: Well, the offer of proof is rejected. The objection to this line of proof is sustained."

(Tr. 123-124.)

Defense attempted to introduce evidence of prior manner of driving, coupled with circumstances from which the jury could reasonably infer recklessness and wilfulness, during the examination of Witness Officer Wong:

"The Court: What is your offer of proof? Put in your full offer of proof right now. If this witness were allowed to testify, what would he testify to?

Mr. Gould: If this witness were allowed to testify, he would testify that when he arrived at the scene of the accident, he recognized Chai as the person whom he had previously seen in the

area of Frankie's Drive-In on Kam Highway; that he observed Mr. Chai cutting in and out of the various lanes and passing in addition thereto, passing between several cars; that he was attempting to catch up with the driver in order to tag him but was unable to do so because of the traffic. That this offer of proof is made not for the purpose of showing any type of violation of any law by Mr. Chai but to show concrete, substantial and credible and important evidence.

The Court: Of what?

Mr. Gould: As to the hurrying and the way Mr. Chai was conducting himself, which is definitely related to his proceeding down Lane No. 3 just prior to the accident. And he, as a matter of fact, testified that his sole purpose of cutting in and out was to keep traffic moving. His testimony had indicated that it was a matter of him attempting to pass various lanes of traffic in order to speed towards his destination. And we think there is a definite relationship.

The Court: What would he testify to regarding speed? We are talking about speeding to his destination. All I heard so far is cutting in and out.

Mr. Gould: Your Honor, it must necessarily follow that when a person is cutting in and out, he is attempting to speed towards his destination.

The Court: That isn't the only inference to be drawn. Presuppose that traffic is crawling at the rate of 5 or 10 miles an hour and stopped, and if you went at 5 miles an hour then you would be cutting in and out but you wouldn't be speeding. You wouldn't show that you are hurrying.

Mr. Gould: If you were cutting in and out, Your Honor? This being the law, you would be showing the matter of hurrying.

The Court: All right. And what is your attitude? You object to this?

Mr. O'Connor: There would be evidence of prior negligence which would have no bearing on this case. And I object strenuously because it is extreme prejudicial.

The Court: Objection sustained. Now, then, you confine your witness to the scene of the accident. Whether he had seen him before is immaterial. Proceed."

(Tr. 402-403.)

In cross-examination of the Plaintiff, Defendant was again prevented from touching on the subject of prior driving even to test the credibility of the witness:

"Mr. O'Connor: I will object to that line of testimony.

The Court: Approach the bench."

(A conference was held at the bench between the Court and counsel in which the following occurred):

"The Court: What is your offer of proof? I will sustain the objection to the last question.

Mr. Gould: Your Honor, this is preliminary.

The Court: To what?

Mr. Gould: To test the credibility of the plaintiff in this area.

The Court: In what area?

Mr. Gould: In the area of his travel. He indicates he was cutting in and out of lanes—and this is to show that he was in a hurry. And, num-

ber two, that he passed an officer illegally, traveling between two cars. And he may very well have been in a hurry to go down that two-lane highway in order to avoid this officer catching up with him. I think, Your Honor, it is very relevant as to the course of the driving that he was pursuing. It was reckless and careless.

The Court: I already said that the matter of cutting in and out was one thing. If you want to go into the area that he was actually in a hurry when he says that he wasn't we have this factor here. What time it is agreed that this accident took place?

Mr. O'Connor: 6:45.

Mr. Gould: We have a deposition indicating that changing lanes to pick up time whenever he had the opportunity. He was cutting into the lanes.

The Court: Well, you confine it to the fact that he was in a hurry, and I will allow it. But if you go off into the area that he was trying to run away from an officer, which is purely speculative—was the officer in a car?

Mr. Gould: The officer was in a car. That is why he didn't catch him.

The Court: Have you got any deposition regarding that? Does it show that it was his state of mind that he was running away from an officer?

Mr. O'Connor: The deposition doesn't have anything like that.

Mr. Gould: We didn't get into that.

The Court: You recognize that whether there was an officer in this traffic, and purely coming down to the matter of the hurry, if he wanted to say that he changed lanes, and so forth, I will let

you go along solely for the purpose for trying to see whether or not when he said he was ten or fifteen minutes in traveling, and that it took him longer to start, to see whether or not he did have a reason to hurry——

Mr. O'Connor: Your Honor, the witness already testified that he didn't have a reason to hurry.

Mr. Gould: We have a right to test his credibility.

The Court: If it is in that position that you have him saying he was trying to make up time——

Mr. Gould: That is exactly it. The reason he pulled into that lane was to pick up some time.

Mr. O'Connor: That's fine. Why don't you ask him that? It is in the third lane when he gets to the intersection——

The Court: Solely in the area that you are trying to show that he was trying to pick up some time, I will allow it. But not for the purpose of showing he was violating any laws at all, whether he passed somebody on the wrong side or not. If you had a chance to depose him—until you have got something that will show that he was trying to run away from the officer—I will allow this. And that is it. So stay away from that, please, or I will have to say some harsh words within the hearing of the jury."

(Tr. 232-235.)

3. Trial Court Erred in Excluding Portion of Deposition Where Said Portion Related to Plaintiff's Awareness of Traffic and Credibility As a Witness.

At trial, much effort had been made to elicit testimony from the plaintiff as to his visibility into the

intersection where the accident occurred (Tr. 283-322). The Plaintiff's earlier deposition had covered this subject, and was contrary to testimony being made at trial by Plaintiff. At the introduction of the deposition at trial, a bench conference was held, where the following occurred:

> "Mr. O'Connor: The same objection.
>
> The Court: The same objection, without the preamble, it all goes out down through line 5, through 19, on the grounds that this was all hashed and rehashed over when Chai was on the stand. Did I get that right, Page 31 Lines 1 through 19 are out.
>
> On Page 33, the question is unintelligible to me to what is being referred to as this portion of the intersection.
>
> Mr. Gould: I think this is one of the most sensitive areas of the whole deposition.
>
> The Court: Never mind your conclusion. Just give me the facts.
>
> Mr. Gould: Yes. These are the facts. The facts are that they clearly related to the question which was asked on Page 32, Line 19. I think that is it.
>
> The Court: Let us read it. I will read it out loud. (To the reporter) Don't take this down. (Reading the section referred to) What is this portion?
>
> Mr. Gould: Referring to the three lanes of traffic, they are talking about an area of two lanes of traffic, and those are the two lanes of traffic specifically that I was referring to.
>
> The Court: 'As far as you know, these two lanes of traffic to your left kept right on moving across Lipoa Street?'

And he was asked, you couldn't see this portion of the intersection? What portion is it?

Mr. Gould: This portion where the two lanes of traffic were moving across Lipoa Street, which is on the way of defining that portion of the intersection very clearly.

The Court: Because it is unintelligible to me, I think it will be confusing to the jury and I cannot understand from the whole context what this portion is referring to, so I am going to strike for that reason.

I am going to strike on Page 33, Lines 3 to 7.

Mr. Gould: I want to make one other comment in this area.

The Court: This area, whatever it is.

Mr. Gould: This area that you are just striking off here. The answer, Your Honor, is so significant because I am looking ahead and I have to visualize it. It is a pretty wide intersection. There is no question—and even as Your Honor has indicated that it is unintelligible—but the witness indicated that he understood."

(Tr. 432-434.)

At the time of taking his deposition, the Plaintiff Benjamin Chai testified:

"Q. And you indicated that when you were in the third lane, at the speed you were moving, you couldn't see this portion of the intersection. Is that true?

A. Because I'm looking ahead. I have to visualize all, and it's a pretty wide intersection there."

(R. Dep. of Chai, 33.)

However, at trial, the Plaintiff testified:

"Q. As you were traveling along this third lane, were you able to observe the intersection insofar as Lanes 2 and 1 are concerned with Lipoa Street?

A. Do you mean if I was able to see into Lane 1 area as I traveled along?

Q. As you traveled along this third lane, were you able to observe the situation of Lipoa and Kam Highway on the makai side of the road?

A. I was able to, yes. Only the second lane I could see.

Q. You could see nothing as far as the first lane is concerned?

A. No, sir, because the cars were moving. There wasn't enough gap to see the first lane or into the intersection itself.

Q. But you could see the second lane?

A. Yes, sir."

(Tr. 283.)

4. It Was Prejudicial Error to Deny Motion for New Trial After Improper Communications With the Jury Were Shown.

These improper communications were testified to by the Bailiff during the arguments for Motion for New Trial, as having taken place between Mr. Humphreys, foreman of the jury, and the Bailiff. (Testimony of the Bailiff):

"Q. Did any of the jurors pose any questions to you as to the possible effect of their failure to agree on a verdict?

A. There were a number of questions posed to me by a number of jurors. One Jurior, specifically Mr. Humphrey, did ask me a question,

the substance of which was, what would happen if the jury were unable to reach a verdict? And I don't believe he used the word 'verdict'. That is my interpretation, my words, my interpretation of the question.

Q. And what did you respond?

A. I responded that if there were no decision, it would be up to the parties to decide what they were going to do at that point.

Q. Did you have any further conversations with him at that time?

A. On that question, no.

Q. Did he ask you any other question?

A. Yes, he did.

Q. What else did he ask you?

A. He asked me who paid the cost of the litigation generally. And I asked him what he meant by costs of litigation. Once again I should point out that he may not have said 'cost of litigation' but I interpreted that in his words as 'cost of litigation'. And I responded by asking him what did he mean by cost of litigation, at which point he said, 'I mean the cost of the Court, Court staff and other costs incurred by the parties.' I said that there were no costs which resulted from the presence of the Judge, the use of the courtroom, the Judge's staff, and any other costs which may be incurred would be incurred by the parties themselves.

Q. Was there any other further conversation in connection with this particular conversation?

A. Yes, there was one additional question which was to the effect of what would happen if one of the parties were a litigant, to which I responded—excuse me—I don't recall if I stated recollection of the question asked. As I recall the

question now, it was, if one of the parties to the litigation were an insurance company, and I responded that they would be treated the same way as any other.

Q. Was there any other further conversation?

A. At that time there was no further conversation with Mr. Humphrey, no. There was no further conversation and we passed on to saying that we have to hurry, it is raining, something to that effect. There was no further conversation than otherwise previously discussed.

Q. What was the last question, what would happen if one of the parties was an insurance company?

A. Yes.

Q. Did anyone else take any part in this conversation just described with Mr. Humphrey?

A. It was only Mr. Humphrey."

(Motion-Tr. Add. 8-10.)

5. It Was Prejudicial Error to Deny Motion for New Trial After a Verdict Not Supported by the Evidence.

The evidence admitted by the Plaintiff as to his own negligence, should have prevented recovery as contributory negligence as a matter of law, regardless of any negligence on Defendant's part.

The Plaintiff's testimony on cross-examination, as to the matter of speed:

"Q. I am trying to find out, Mr. Chai, where it was that you made this observation of 32 miles per hour relative to when you first entered the third lane.

A. I made the observation while I was traveling there, looking down, where I was.

Q. And you have no idea how far you had traveled down the third lane when you first made that observation?

A. No, sir.

Q. Would you say that you were more than halfway the distance from where you entered into the lane to Lipoa Street when you made that observation?

Mr. O'Connor: Your Honor, I object to the question. The witness testified he didn't know where he was.

The Court: Objection overruled.

A. I don't know, sir."

(Tr. 257-258.)

The Plaintiff's testimony on cross-examination, as to the matter of watching out for other traffic:

Q. You understand that we are talking now about the cars in Lane No. 2 beyond the intersection of Lipoa Street.

A. Yes, I do.

Q. And what were those cars doing?

A. They were stopped.

Q. Were they at a complete stop?

A. I saw the brake lights on. I know they were stopping again.

Q. How far were you from the corner of Lipoa Street when you saw the brake lights were on and you knew they were stopping?

A. I don't really know, sir.

Q. You have no idea?

A. No, sir."

(Tr. 281.)

The Plaintiff's testimony again on cross-examination, on the matter of other traffic:

"Q. (By Mr. Gould): Mr. Chai, can you give us any estimate at all how far you were from the intersection of Lipoa Street and Kam Highway when you observed vehicle 'CC-2' at a stop?

A. Mostly because, while I was traveling as fast as I saw that car stopped, the area of 'CC-1', in other words, is when I had the impact with Mrs. Hymer. I cannot say when.

Q. Did you see 'CC-2', before you saw 'CC-1'?

A. Yes.

Q. And when you saw 'CC-2', this was already stopped?

A. I saw the car. I cannot describe the car. There are various cars. When I came down, I saw the crossing there. Everybody was stopping. That car stopped. And I was practically on 'CC-1' then when I realized——"

(Tr. 299.)

Additional testimony was presented by the Witness Lawrence on the speed of the Plaintiff:

"Q. (By Mr. Gould): Did that same sound that you heard initially, as you indicated, was a roar of acceleration, did that same sound continue all the way up the lane until the point of impact?

Mr. O'Connor: I object. There is no proper foundation.

The Court: Objection overruled.

Mr. Gould: Would you answer that, please?

A. Yes, sir."

(Tr. 149.)

And Mr. Lawrence's testimony on the speed at the time of impact:

"Q. (By Mr. Gould): And what speed did you estimate him to be traveling at the time of the accident?

A. Between 30 and 40.

Q. Mr. Lawrence, you have already testified, have you not, that when I met with you in your home we discussed this accident with you, on February 17, 1967?

A. Yes, sir.

Q. It was last Friday?

A. Yes, sir.

Q. Did you tell me at that time——

Mr. O'Connor: I am going to object to this modus operandi on the part of Counsel for impeaching the witness. He had two long conversations evidently with the witness, and he is using some brief moments during one of them in order to impeach.

The Court: Counsel, you assume facts that I don't know about—how long it was. I don't know whether it was a long conversation. The objection is overruled. Go ahead with your question. Let's hear the question.

Mr. Gould: Thank you.

The Court: On the 17th was it? Which one?

Mr. Gould: The 17th, Your Honor.

The Court: All right.

Q. (By Mr. Gould): Did you tell me that it was your opinion that the speed that he attained at the time of the accident was 40 to 45 miles per hour?

A. Not more than 45, and not less than 30 at that time I told you.

Q. And on February 13, 1967, that was the time before when I was at your home, did you tell me at that time that it was your best estimate that it was between 40 and 45 miles an hour?

A. Not more than 45, not less than 30; 40 to 45, it could be. It depends on the motorcycle."

(Tr. 153-154.)

6. It Was Error for the Court to Deny Motion for Mistrial After Plaintiff's Counsel Questioned Defendant As to a Possible Criminal Conviction for Traffic Violation in the Presence of the Jury.

The question was presented on the incident from which this civil action arose. (Mr. O'Connor's examination of the Defendant):

"Q. Mrs. Hymer, were you convicted of an offense arising out of this accident, namely, a violation of the right of way on a left turn, unsignaled change in an intersection?

Mr. Gould: If the Court please, I will object on the grounds that it is irrelevant, immaterial, and highly prejudicial.

Mr. O'Connor: May we approach the bench?

The Court: Approach the bench.

(A conference was held at the bench between Court and Counsel, in which the following occurred):

The Court: What is your offer of proof?

Mr. O'Connor: My offer of proof is that the answer to this question would be that Mrs. Hymer was convicted for such an offense.

The Court: Spell it out. From a trial or plea of guilty or what?

Mr. O'Connor: She went down to the Pearl City Traffic Court, pleaded No Contest, and was found guilty by the Judge.

The Court: As it stands like that, plea or Nolo, guilty as charged, that is the way it is? Go ahead.

Mr. O'Connor: Section 222-22 which reads—'Discrediting witnesses by proof of conviction. A witness may be questioned as to whether he has been convicted of any indictable or other offense; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.'

The Court: We all recognize on the old basis in order to avoid the stigma of a conviction on a criminal matter, the pleading of a No Contest, not for the purpose of admitting that they were guilty of the charge but simply saying, 'I am not going to fight it.' But the ordinary rule is that Nolo is not evidence of a conviction, for the purpose intended, for an admission of guilt or conviction of guilt. It is simply used to dispose of the case and is not a conviction within the terminology of a case for impeachment of the individual. The whole basis behind it is to show that it will not show a conviction when in a civil matter.

Mr. Gould: We have the rationale——

The Court: Let me see it. (Mr. Gould hands a document to the Court.) Have you got anything else?

Mr. Gould: Well, at this time we are going to ask for a mistrial.

The Court: I am not going to give you a mistrial. I will tell the jury what it is all about. Then you can move for a mistrial, if you want to.

Mr. Gould: That is not exactly in point, but it shows the rationale of not allowing a convic-

tion to be stated, a conviction on the same traffic charge which is involved in this case." (Referring to a citation in a book.)

(Conference at the bench was concluded at this point.)

"The Court: The objection to the last question is sustained.

Ladies and gentlemen of the jury, I can tell you that the mere fact that a question is asked regarding a conviction, and so forth, and the objection to that is sustained, that you cannot presume from that that she was convicted or wasn't convicted. The matter of the present status is that the objection is sustained and you will ignore the question and all the implications which might arise in the question itself.

Mr. Gould: Your Honor, may I renew my motion at this time?

The Court: The motion is denied."

(Tr. 51-54.)

7. It Was Prejudicial Error for the Court to Fail to Control Final Arguments of Counsel Within Boundaries Recognized At Law.

Plaintiff's counsel implied that experts were available but not called, without foundation in the evidence in the case that such experts exist. (The official transcript is in error on this passage regarding identities of the speakers; corrected identities are shown in brackets):

"The Court [Mr. O'Connor]: I have already been through that with you. You can make your own vector analysis if you want to, as I did. And you noticed that Mr. Gould slipped over this very nicely to you in his argument. Consider the facts

of the accident, and you can consider the damage to the car. Let me tell you how much you can consider the damage to the car. You can wax emotional but Mr. Gould said that the hood was torn and the fender was dented. But we have no evidence in this case by anyone who is an expert, that this damage indicates anything more than a 30-mile an hour motorcycle hitting an automobile, and no expert sat on that witness stand and said anything to you in that regard. It was your position, as testified to you by Mr. Chai, that he was going 32 miles an hour. Mr. Gould took such tremendous issue with that. And why didn't you present an expert in this courtroom who would have given you an estimate in speed?

Mr. O'Connor [Mr. Gould]: If the Court please, that is purely speculative, getting into an area in which there may or may not be experts. There was no evidence to that——

The Court: Counsel, I will allow this to go so far—you have four minutes left."

(Argument—Tr. Add. 75-76.)

Plaintiff's counsel misstated the law to the jury, over Defendant's objections (Argument of Mr. O'Connor):

"You know in your own driving that a person who has the right of way, if he says, well, I have got the right of way but I can go ahead and do anything I want because if we get into an accident, if I get into an accident with a person who doesn't have the right of way—or vice versa, if the person who didn't have the right of way said that he could do anything he wanted to do any time and if he gets into an accident it will be

equally the fault of both persons, even if the other person is exercising his right of way—wouldn't we be in a heck of a mess in a situation like that? The person who has the right of way has the privilege of exercising it. And I believe that the Court is going to instruct you that the right of way is the privilege of immediate priority in the use of the roadway. In this case, Benjamin Chai had the privilege to utilize that roadway at a speed which was reasonable under the circumstance. And here are the provisions which apply to Benjamin Chai:

'Section 15-7.2. Speed limit zones.

No person shall drive a vehicle on a public highway or street at the speed in excess of the following speed limit zones established or hereafter established therefor by ordinance of the City Council.

Thirty-five miles per hour.

(a) On those streets or portions thereof described . . . .'

And this includes Kam Highway between Pearl City and Aiea. And 35 miles per hour.

'Section 15-7.3. Speed limit signs.

The speed restrictions set forth in Section 15-7.2 . . .' . . . and that is the 35 miles an hour . . . '. . . on roadways, streets, highways or boulevards, or portions thereof, shall be ineffective unless legible signs are erected and maintained indicating the maximum speed permissible thereon.'

There was a sign on this highway that said 35 miles an hour. There was no sign which said, under certain conditions the speed is reduced to

25. There was no sign that had those blinking lights that reduced the speed because of traffic. There was no sign that said——

Mr. Gould: If the Court please, I am awfully reluctant to interrupt again but counsel is attempting to testify that Mr. Chai is not susceptible to all the ordinances. He said this ordinance is applicable to Mr. Chai——

The Court: The jury will understand that counsel is arguing. The objection made by Mr. Gould as to Mr. O'Connor is the argument. And, ladies and gentlemen of the jury, this is argument and I will read to you what the ordinance says. Mr. O'Connor you may continue."

(Argument—Tr. Add. 72-74.)

8. **The Court Erred in Refusing Requested Instruction on the Law Regarding Exercise of Right of Way.**

The proffered instruction, Defendant's number 18 (R. 62):

> "You are hereby instructed that a right of way is not absolute but at all times relative and subject to the fundmanetal doctrine that a party shall exercise the right so as to avoid injury to himself and others."

was denied after discussion in chambers:

> "Mr. Gould: Mossman v. Sherman, 34 Hawaii.
> The Court: I will take a look at it right now.
> Mr. Gould: Page 41.
> The Court: 41?
> Mr. Gould: No. 481.
> The Court: What do you say, Mr. O'Connor?
> Mr. O'Connor. I would object to it.
> The Court: On what grounds?

Mr. O'Connor: On the grounds that it is completely out of context and not applicable to the case. You are already saying that the violation of an ordinance is evidence of negligence, period. And this simply takes a statement in a case in which you have an entering intersection situation, a set of facts to which that law is made applicable and facts which are different from the facts here. And all he is trying to do is to take a section from that case and make an instruction out of it. And I don't think this instruction necessarily is applicable to the case at hand.

Mr. Gould: Except, Your Honor, that I have a feeling that in this particular area many, many people feel they have an absolute right of way. And I believe in fairness to the defendant, particularly in view of that case, certainly the fundamental law is clear as to the right of way, that it is not an absolute right of way. It still has to be exercised with caution. I think that is the way you read it substantially.

The Court: That is what they did in the McCombs case which was cited in Mossman v. Sherman. It was the joker and the case supporting that was a two-car intersection case. Each one said, I had the right of way. And the Sherman case says that the operator of the other vehicle was given the right of way, and that the right of way can be exercised, and so forth. The McCombs case was exactly the same thing where two of them had the right of way and came at right angles and where it became an issue of fact for a jury to determine. And, quoting from the case,

> 'The mere fact that the operator of a motor vehicle reaches an intersection prior to the entry of another automobile therein does not in

and of itself give such operator the right to proceed across the intersection in any event; and where it becomes an issue of fact for a jury to determine whether or not in approaching or proceeding across an intersecting highway the operator of the motor vehicle first reaching or entering upon the intersection, in the exercise of due care, might have avoided a collision and resultant injuries, and instruction to the effect that irrespective of the existing conditions such operator has a right to proceed across the intersection is erroneous.'

They are pulling back from the Mossman case. 'Under the defendant's testimony, the jury might reasonably find that approaching car, that his failure to take any measures before the collision . . . '—that his failure to do so was negligence.

The approaching car was 25 feet away. Now, you don't have that here. Neither said that they were aware of the other until they sensed it. However, I feel that this is innocuous enough and it is fundamental for a party to so exercise his right of way. It work both ways.

Mr. O'Connor: No, it doesn't work both ways.

The Court: Why not?

Mr. O'Connor: Because my client had the right of way. And the situation is not the same.

The Court: I will agree.

Mr. O'Connor: And if this instruction is given, it opens a whole door which should not be there, because it is not a situation where some party saw another party, and for some great distance, and he would, oh, I am going to go ahead anyway because I have the right of way. This is a situation where a right of way should have been determined prior to the entrance of the place

where the accident took place. And there was no ability for one car to see another all the way across.

The Court: I am not going to give it. I have decided. It is not a Mossman v. Sherman case here. I don't think it is applicable. So it is refused. I feel that the other instructions will cover the whole picture. I feel that the instruction I have on the ordinance covers this. What do you think?

Mr. O'Connor: I think this is an incorrect statement of the law based on Young v. H.C. & D.

The Court: I feel that Young v. H.C. & D. goes into this, and it is a better statement of the law. What do you want to do? Why do you feel it is necessary?

Mr. Gould: We feel it is necessary, Your Honor, because the instructions you gave, the instruction as you gave it, makes the finding of a violation of the statute negligence is obligatory. And this thing makes it optional with the jury. And it leaves the finding of fact in the hands of the jury rather than the Court. And this is almost a peremptory instruction of the Court, telling them that if they find a violation of the ordinance, they have got to find negligence. It is misleading. And this particular instruction puts the ordinance into a proper light.

The Court: While a violation of an ordinance is not necessary negligence, that portion is misleading.

Mr. O'Connor: It is just not true.

Mr. Gould: As a matter of law?

The Court: The violation of an ordinance is negligence——."

(Tr. 532-536.)

Objection was restated in open court:

"Mr. Gould: If the Court please, the defendant objects to the failure of the Court to give requested instructions and objects to the giving of instructions as objected to and for the reasons previously given in Chambers therefor.

The Court: The same is incorporated in the record as if they were made at this time."

(Tr. 581.)

SUMMARY OF ARGUMENT

1. **The Trial Court Erred in Allowing the Loss of Consortium Claim on Plaintiff's Wife to Proceed to Judgment.**

   (a) The claim prayed for by Plaintiff, Victoria Chai, on the face of the pleadings, $7,500, was less than the jurisdictional minimum.

   (b) The Plaintiff, Victoria Chai's claim cannot be aggregated with that of Plaintiff, Benjamin Chai, to reach the jurisdictional minimum.

   (c) The Plaintiff, Victoria Chai, has no cause of action for which relief may be granted, since in the absence of statute, the majority common law position is that a wife is not entitled to recover for loss of consortium due to injury to the husband.

   (d) Hawaii has no statute granting the wife such relief.

2. **It Was Prejudicial Error to Exclude Evidence Offered to Show the Plaintiff's Prior Manner of Driving.**

   (a) Defendant's position is that Plaintiff was guilty of contributory negligence, or assumed the risk, in attemping to travel through a crowded, slow intersection at or near the posted maximum speed limit.

   (b) The proffered evidence, rejected by the trial court, was directly relevant to the issue of contributory negligence, and material to the issue of assumption of risk.

   (c) There is ample authority for the admission of such evidence.

   (d) To deny the jury the right to raise reasonable inferences of state of mind, attitude and credibility of the Plaintiff was prejudicial to the Defendant's cause.

3. **Trial Court Erred in Excluding Portion of Deposition Where Said Portion Related to Plaintiff's Awareness of Traffic and Credibility As a Witness.**

   (a) Plaintiff's visibility in the intersection was essential to the issue of contributory negligence.

   (b) Plaintiff's deposition contained inconsistencies with his testimony at trial on this issue.

   (c) Trial court erroneously excluded this portion of the deposition from reading at trial, by State rules of evidence.

(d) Trial court intruded in the province of the jury in determining the weight to be given to answers to questions understood when asked.

4. **It Was Prejudicial Error to Deny the Defendant's Motion for New Trial, After Improper Communications With the Jury Were Shown.**

(a) Questions were asked by the jury Forman, of the Bailiff and answered by the Bailiff, which were material to the ability of the jury to reach a verdict, at a time when, by the nature of the questions, it appears the jury was deadlocked.

(b) A verdict so tainted should be held to be void, absent an affirmative showing of no effect on the outcome of the verdict.

5. **It Was Prejudicial Error for the Trial Court to Deny Defendant's Motion for New Trial When the Verdict Was Not Supported by the Evidence.**

(a) Plaintiff's admissions during trial were sufficient to establish contributory negligence as a matter of law.

(b) There is ample Hawaiian authority to support a finding of contributory negligence as a matter of law.

(c) There was insufficient evidence to support a jury verdict of negligence of the Defendant.

(d) New trial should be granted when a verdict is rendered which is not supported in law under the facts shown.

6. **The Trial Court Erred in Denying the Defendant's Motion for Mistrial After Plaintiff's Counsel Improperly Questioned Defendant As to a Criminal Conviction for Traffic Violation Arising From the Same Facts As Then Before the Jury.**

   (a) By the majority rule, questions as to criminal convictions are inadmissible as immaterial and highly prejudicial.

   (b) The Hawaii law allowing such questions applies only to convictions for purposes of discrediting a witness.

   (c) The Defendant had not been convicted, as Plaintiff's counsel was aware, of a criminal offense since a plea of nolo contendere had been entered and accepted.

   (d) The question was not placed for the purpose of discrediting the witness but to create a prejudicial inference in the minds of the jurors.

   (e) After the question was heard by the jury, the highly prejudicial inference created was beyond the ability of the court to cure by instruction.

7. **It Was Prejudicial Error for the Trial Court to Fail to Control the Final Arguments of Plaintiff's Counsel Within Boundaries Recognized At Law.**

   (a) Plaintiff's counsel called attention to the failure of Defendant to call certain types of expert witnesses, when no such experts were called by the Plaintiffs, or shown to exist.

   (b) Plaintiffs' counsel argued law to the jury in final argument, misstating the Hawaii law of right-of-way.

8. **The Trial Court Erred in Refusing the Defendant's Requested Instruction on the Hawaii Law of Exercise of Right-of-Way.**

   (a) The requested instruction was essential to the issue of right-of-way in connection with contributory negligence and assumption of risk.

   (b) The requested instruction was accurate, applicable and relevant to the issues presented.

   (c) Refusal to give the instruction denied the Defendant a fair consideration of her cause and constituted reversible error.

ARGUMENT

1. ERROR IN ALLOWING THE LOSS OF CONSORTIUM CLAIM OF THE DEFENDANT'S WIFE.

The claim prayed for by the Plaintiff, Victoria Chai, was by the face of the pleadings $7,500, and less than the jurisdictional amount. Where, by the face of the pleadings, the Plaintiff cannot recover the jurisdictional minimum, jurisdiction should be denied. *Otis Elevator Co. v. Seale,* 334 F.2d 928 (1964); *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 282, 82 L.Ed. 845 (1938).

Moreover, the claim of the Plaintiff Victoria Chai cannot be aggregated with the claim of her husband, Plaintiff Benjamin Chai to reach the jurisdictional minimum. In *Eagle Star Insurance Co. v. Maltes* (CA 5 1963) 313 F.2d 778, the Court held:

> "To aggregate claims of several Plaintiffs, the Plaintiffs must have a 'common and undivided

> interest' though it may be separable as between themselves. 'But where their interests are distinct and their only relationship is that they form a class of parties whose rights or liabilities arise out of the same transaction, or have a relation to a common fund or mass of property sought to be administered, such distinct claims or liabilities cannot be aggregated.' *Clay v. Field,* 138 U.S. 464, 11 S.Ct. 419, 34 L.Ed. 1044 (1891)." See *Alvarez v. Pan American Life Ins. Co.* (CA 5 1967) 375 F.2d 992, *Louf v. Nelson* (Mont. 1965) 246 F.Supp. 307.

In *Coffman v. City of Wichita* (Kans. 1958), 165 F.Supp. 765, the Court dismissed because individual plaintiffs failed to meet jurisdictional requirements, citing *Aetna Ins. Co. v. Chicago R. I. & P. R. Co.,* (CA 10 1956) 229 F.2d 584, 586. In *Bounougias v. Peters* (CA 7 1966), 369 F.2d 247, ancillary jurisdiction was denied where claims were based on different facts, again citing *Aetna, supra.*

Here, by the pleadings and the evidence, the claims of the Plaintiffs, Victoria and Benjamin Chai, are based on different facts, since Victoria Chai's claim is based on loss of services, companionship, etc. Although common in an interest in the controversy "they are not individual in the sense that they constitute in a totality an integrated right," *Aetna, supra,* in that the claim of Mrs. Chai could fail while that of Mr. Chai could be sustained without reaching inconsistent results.

Further, the Plaintiff, Victoria Chai, failed in the pleadings, or in the proofs, to found a claim for which relief may be granted.

> "In the absence of statute, a wife has no cause of action for any loss sustained by her, including loss of consortium in consequences of personal injuries inflicted on the husband." 41 CJS Husband and Wife Section 404, cited in *Potter v. Schafter,* 161 Me. 340, 211 A.2d 891, 892; *Page v. Winter,* 240 S.C. 516, 126 S.E.2d 570; *Rush v. Great American Ins. Co.,* 213 Tenn. 506, 376 S.W.2d 454, 455.

In *Werthan Bag Corp. v. Agnew* (CA 6 1953) 202 F.2d 119, the Court held:

> "It is well established that the right to recover for loss of consortium which a wife has in certain circumstances where her common law disabilities have been removed (such as an action for alienation of the husband's affections or in actions against persons unlawfully selling him deleterious drugs) does not extend to a case in which this right has been indirectly interfered with by negligent injury to the husband. The wife is held to have no cause of action for such injury." See *Criqui v. Blaw-Knox Corp.* (CA 10 1963—Kans.) 318 F.2d 811, following and citing *Werthan Bag Corp., supra.*

In *Carey v. Foster* (CA 4 1965—Va.) 345 F.2d 772, the Court surveyed American jurisdictions and found that a wife's claim for consortium was not allowed in: Ala., Ariz., Colo., Fla., Ind., Kans., Md., Minn., Ky., N. J., N. M., N. Y., Okla., Pa., S. C., Tenn., Tex., Wash., W. Va., and Wisc. 345 F.2d 777 n. 5.

2. PREJUDICIAL ERROR TO EXCLUDE EVIDENCE OF PRIOR MANNER OF DRIVING.

It is the Defendant's position in this cause that the Plaintiff was guilty of contributory negligence, or assumed the risk when he attempted to cross through the intersection where the accident occurred at or near the maximum posted speed limit in crowded traffic which was at a standstill or at a stop. The Defendant's offer of proof as to evidence of the manner of prior driving, included evidence that the Plaintiff had, for several miles, moved from lane to lane at high speeds, during which the Plaintiff may have illegally passed a police officer, who was, at the time of the accident, wanting to catch up to the Plaintiff in order to ticket him. This evidence was not offered to show a violation of the law, but merely to show the circumstances from which the jury might reasonably infer what the Plaintiff's demeanor was at the time of the accident.

> "Testimony as to the manner at the time prior to and at a place before reaching the scene of an accident is often admitted to corroborate evidence that the vehicle was operated in the same manner at the place where the accident occurred, even though the remote evidence standing alone would not be legally relevant. (Citations omitted.) Likewise testimony of a third person concerning the manner in which a party to the accident was driving at some point before he reached the scene of the accident, may be admitted to refute the parties' testimony as to the manner in which he was driving. (Citations omitted.) In cases where recklessness, wantonness, or willfulness are in

> issue it is frequently necessary, or desirable in order to establish a strong case to show not only the indifference to consequences at the incident the accident occurred, but also a state of mind such as heedlessness or willfulness that persisted for several minutes prior to the accident. Where such a mental attitude is important in a case the Court may well admit evidence concerning the manner or driving a substantial time before or distance from the accident." 46 ALR 2d 21.

The evidence offered was both relevant and material to the issue of Plaintiff's conduct at the time of the accident and his state of mind immediately prior to the accident which bear on the issue of contributory negligence and to assuming the risk. In addition, it was material as to the credibility of the Plaintiff's testimony. In *Comins v. Scrivener* (CA 10 1954), 214 F.2d 810, 46 ALR 2d 1, the Court held:

> "The testimony given by the witness . . . did not merely show the speed at which Plaintiff was travelling at the point 3, 5, or 10 miles from the point of the accident, in addition it showed circumstances from which the jury could reasonably infer that after the Plaintiff passed the witness, he continued to travel at an excessive and dangerous rate of speed up to the point of the accident. It showed circumstances from which the jury could reasonably predicate the deduction that Plaintiff's dangerous rate of speed in excess of that permitted by the law of the State continued up to the point of the accident. The testimony was admissible as tending to show the speed at which the Plaintiff was travelling when he passed the witness and also tending to show the circum-

stances from which it could be inferred that such speed continued up to the point of the accident." *Comins v. Scrivener, supra,* cited in *Brower v. Quick* (Iowa 1958), 88 N.W.2d 120, 127.

The offered evidence would have been received, limited to the reasonable inferences that the jury might draw with respect to state of mind, heedlessness, and credibility of the Plaintiff's testimony, as they effect the issues of the contributory negligence and assumption of risk at the time of the accident. Failure to admit this evidence constituted reversible error. *Wagnon v. Porchia* (1962), 235 Ark. 731, 361 S.W.2d 749; *Lovejoy v. Tidwell,* 212 Ga. 750 (1956); both citing *Comins v. Scrivener, supra.*

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3. TRIAL COURT ERRED IN EXCLUDING PORTION OF DEPOSITION, WHERE SAID PORTION RELATED TO PLAINTIFF'S AWARENESS OF TRAFFIC AND CREDIBILITY AS A WITNESS.

The deposition of the Plaintiff, Benjamin Chai, in the testimony later excluded by the trial court, indicated that the Plaintiff understood the questions concerning visibility into the intersection where the accident occurred, particularly with respect to the superposition of Kamehameha Highway's two Honolulu-Bound through lanes, and Lipoa Street. Since these two lanes of traffic were in the direction from which Defendant approached, (the Plaintiff's left), ability of the Plaintiff to see this area was relevant to the issue of contributory negligence.

Given the admission in the deposition, ie., that the Plaintiff could not see into the intersection, the jury could have reasonably inferred contributory negligence to the Plaintiff by his act of proceeding into a "blind" intersection at his admitted speed of 32 mph. However, if he could see into the intersection to his left, as he testified at trial, the question is raised as to why he did not see the Defendant's automobile approaching. In either case, the Plaintiff's testimony in this sensitive area should have been subject to the further scrutiny of the jury in the light of Plaintiff's prior admissions.

Although it is conceded that the trial court has great discretion in admissibility of evidence, the degree of intelligibility of the questions in the deposition must be interpreted, not in the light of the transcript alone, but in reference to a diagram, Defendant's Exhibit "E" (Tr. 302), prepared during the deposing, by the Plaintiff. This diagram was available to the jury during the Plaintiff's testimony (Tr. 302 et seq.) so that the questions referring to "area" or "portions" of the intersection in the deposition could have been explained in terms of Exhibit "E", and the conflict in the Plaintiff's testimony brought before the jury.

The Plaintiff's testimony on his understanding of the intersection is also in conflict with his deposition. In his answer in the deposition, excluded by the Court, he indicated he could not see a portion of the intersection "and it's a pretty wide intersection there" (R. Dep. of Chai 33). At trial, presented with the same diagram, the Plaintiff purported not to

understand which area of the intersection was referred to by the questions (Tr. 304 et seq.). However, the Plaintiff had testified earlier that he could see nothing of the first lane of traffic in these words: "No, sir, because the cars were moving. There wasn't enough gap to see the first lane *or into the intersection itself"* (Tr. 283) [Emphasis added]. It is apparent that the "intersection" referred to is inconsistent with the "pretty wide intersection" not visible "because I am looking ahead", described by the Plaintiff's deposition in the excluded portion (R. Dep. of Chai 33).

The conflict thus presented was relevant to the credibility of the witness, and factual evidence of Plaintiff's visibility and awareness, and should have been admitted. Rule 26(d)(2) F.R.C.P.

Further, the standard to be applied on the admissibility of evidence is that of the courts of general jurisdiction of the State in which the United States Court is held, *which is most favorable to the reception of evidence. Cordle v. Allied Chemical Corp.* (CA 6 1962), 309 F.2d 821. In the instant case, the Hawaii law as pronounced in *Cozine v. Hawaiian Catamaran, Ltd.,* 49 Haw. 77, 412 P.2d 669 (1966), reh.den. 49 Haw. 267, 414 P.2d 428 (1966) should apply. In that case, the Court reversed where the trial court had refused to allow cross-examination of the plaintiff on the contents of an affidavit, holding that:

> "We first direct our attention to the right of defendant to cross-examine on the subject of this affidavit. Even apart from the fact that this witness was the plaintiff in the case, she could as

> a witness be cross-examined as to specific acts affecting her credibility. *Republic v. Luning,* 11 Haw. 390; *Territory v. Buick,* 27 Haw. 28, 46. Such cross-examination rests in the discretion of the court, and is reviewable only for abuse of discretion, but we find an abuse of discretion here. *The witness being the plaintiff and the affidavit having been made in this very case, it was error not to permit cross-examination as to the truth of the statements made in the affidavit.*" 49 Haw. 101. [Emphasis added.]

Thus, where a deposition was made by an adverse party, and the questions later excluded were understood and answered, it was an invasion of the province of the jury for the trial court to rule the questions unintelligible, when it would appear that the questions were understandable to the deponent since they were asked and answered without objection. The degree of intelligibility of the testimony should have been a question for the jury going to the weight of the evidence.

> "The jury is the sole judge of the credibility of the witnesses and the weight of the evidence." *State v. Carvelo,* 45 Haw. 16, 33.

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4. IT WAS PREJUDICIAL ERROR TO DENY NEW TRIAL AFTER IMPROPER COMMUNICATIONS WITH THE JURY.

In the instant case, the trial court ruled that although the admittedly improper communications between the Baliff and the Jury Foreman did take place, that there was not grounds for a new trial,

because the communications did not affect the merits of the case; however, it is contended that they did in fact affect the outcome because they took place at the time when, by the nature of the communications themselves, it was presumable that the jury had reached a deadlock. All of the questions asked of the Bailiff by the Jury Foreman were dealing with the consequences if the jury were unable to reach a verdict, to wit: what would the parties do next if no verdict were reached; where the cost would lie in that situation; and what would be the consequences if one of the parties were an insurance company. Although none of the questions were relevant to issues of fact before the jury, the implications are clear. In *Kavanaugh v. Quigley,* 63 N.J.Super. 153, 164 A.2d 179 (1960), wherein the Bailiff violated his oath by communicating with the jury while impaneled, a motion for new trial after verdict was denied by the trial court, the denial being reversed on appeal. In so holding the Court said,

> "But if the record fails to show whether or not the irregularities were prejudicial as in the case here, it is presumed to be so and to be cause for reversal. It is only when the irregularity is affirmatively shown to have had no tendency to influence the verdict, that reversal is not required."

The Court continued:

> "However, the overriding consideration is firmly established public policy that a new trial should be granted or refused, 'with a view, not so much to the attainment of exact justice in the particular case, as to the ultimate effect of the decision

upon the administration of justice in general.' (citations omitted.) Apart from the question of prejudice, we think that in the service of this policy, the Court can ill afford to rationalize illegal conduct which is not only an affront to the dignity of the Court, but in addition, removes the trial judge from his control of the case." (*Kavanaugh v. Quigley, supra,* 184.)

Thus, in the instant case, the verdict of the jury has been tainted and the inference is raised that the communication with the Bailiff dealing with where the costs would lie for a new trial and what would happen if the jury failed to reach a verdict, while not dealing directly with the issues of the case, was material to the ability of the jury to reach a verdict and that in such circumstances the decision should be reversed and new trial had to remove the cloud from the present verdict.

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5. **IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR NEW TRIAL WHEN THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE.**

Contributory negligence should have been found against the Plaintiff in this case as a matter of law. Plaintiff's admissions in open court, which must be taken as facts when against Plaintiff's interest, should be sufficient to support a finding of contributory negligence as the only reasonable inference. First, Plaintiff admitted to maintaining a high rate of speed, just below the maximum posted limit for ideal conditions, until impact occurred, under traffic conditions he him-

self described as heavy, stop and go. Secondly, the Plaintiff admitted that he approached an intersection where, he again admitted, traffic was slowing and stopping, without being able to see into the intersection, at the same high rate of speed. Thirdly, Plaintiff admitted that he did not notice that traffic had come to a complete stop in the adjoining left hand lane, until he was one car length from the intersection where impact occurred, while it cannot be disputed that this traffic must have been stopped for at least the length of time required for the Defendant's automobile to transit the adjoining lane. Finally, it cannot be disputed that the Plaintiff's speed directly contributed to the extent of his injuries. In *Young v. Price,* 47 Haw. 309, 388 P.2d 203 (1963), the Court held:

> "Further where the facts are disputed and reasonable men might differ on the facts or the inferences which may be reasonably drawn from the facts, the question of negligence is left to the jury under proper instructions; but where there is no conflict from the evidence and but one inference can be drawn from the facts, it is the duty of the court to pass upon the question of negligence and proximate cause as questions of law. *Carreira v. Territory,* 40 Haw. 513, 517. This is equally true where contributory negligence is the issue. *Ferrage v. Honolulu Rapid Transit,* 24 Haw. 87, 91." 47 Haw. 313.

There is ample Hawaiian authority to support a finding of contributory negligence as a matter of law. In *Ferrage v. Honolulu R. T. & L. Co.,* 24 Haw. 87 (1917), the Court held:

"Questions of negligence, contributory negligence and proximate cause are usually for the jury to determine, but where the facts are undisputed and but one reasonable influence can be drawn from them it is the duty of the court to pass on them as questions of law. 29 Cyc. 630, *Desky v. Lack,* 11 Haw. 395, *Fuller v. Honolulu R. T. & L. Co.,* 16 Haw. 1, 11, *Dong Chong v. Honolulu R. T. & L. Co.,* 16 Haw. 272. The duty to observe ordinary care requires that the driver of an automobile must anticipate the possibility of meeting pedestrians or other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision. *Brommer v. Pennsylvania R. Co.,* 179 F. 577, *Gregory v. Slaughter,* 8 LRA (NS)(Ky.) 1228, *Weidner v. Otter,* 188 S.W. (Ky.) 335, *Rupp v. Keebler,* 175 Ill. App. 619, *Geiselman v. Schmidt,* 106 Md. 580, 585, *Lauson v. Fond du Lac,* 141 Wisc. 57, 60.

The evidence clearly showed that the plaintiff approached this street intersection at an excessive rate of speed, and without attempting to slow down until the street car came into view, so that it was impossible for him to either stop or turn his car so as to avert the collision. That was negligence as a matter of law and the jury could not have said that it did not contribute to the injury." 24 Haw. 87, 91-92.

Furthermore, the question of credibility of the Plaintiff's statements is raised by the testimony of the Witness Lawrence, who testified that he could hear the Plaintiff's motorcycle accelerating all the way down the lane until impact occurred. Discrepancies also appear in the Plaintiff's own testimony as to when and where he determined his speed.

In addition, there was no substantial evidence presented at trial which could support negligence to the Defendant. Allegations were made that Defendant usurped Plaintiff's right of way, but no evidence was presented on this question by the Plaintiff, except an inference raised by an improper question placed to the Defendant, but not answered, before the jury (see Argument 6 herein).

By the Plaintiff's own admission, he did not see the Defendant's automobile until the instant just before impact. It follows, therefore, that visual obstructions between the parties prevented Defendant from seeing; by the Plaintiff's theory of the case. Defendant should not, therefore, be held to a higher standard of care than Plaintiff.

It is apparent that whether or not Defendant usurped the right of way, Plaintiff was bound to exercise his right of way with due care to avoid collisions. *Mossman v. Sherman,* 34 Haw. 477 (1938). Thus the same set of facts, the occurrence of a collision in the intersection, are as probative of the Plaintiff's contributory negligence as they are of the Defendant's negligence, to wit: that each owed the other a duty of reasonable care to avoid collision. For every inference that can be raised as to the negligence of the Defendant, there is a coequal inference of contributory negligence against the Plaintiff under the facts admitted by the Plaintiff.

Where the evidence, as here, fails to support a verdict of the jury, a new trial should be granted. *Yo-*

shioka v. Shiroki, 29 Haw. 459 (1926); *Re Heeb's Estate,* 26 Haw. 538 (1922); *Robinson v. Honolulu Rapid Transit,* 20 Haw. 426 (1911).

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6. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AFTER PLAINTIFF'S COUNSEL IMPROPERLY QUESTIONED DEFENDANT AS TO A CRIMINAL CONVICTION FOR TRAFFIC VIOLATION ARISING FROM THE SAME FACTS AS THEN BEFORE THE JURY.

In this case, Plaintiff's counsel asked the Defendant, in the presence of the jury, whether or not she had been convicted of a traffic violation arising out of the accident at issue. The question was improper, immaterial, and highly prejudicial, as inflammatory. Immediate objection was raised by Defense counsel, sustained, but the jury was left with an inference of the facts then before them, which could not be cured by instruction, and which was prejudicial to Defendant's cause.

> "It has been a traditional rule that a judgement of conviction in a criminal prosecution is not admissible in a civil case as evidence of the facts upon which it was based various reasons have been assigned for this rule, it having been variously held as a foundation for the rule, that there is a dissimularity in objects, issues, results, procedures, and parties in the two actions, as well as a lack of mutuality." 29 AmJur.2d 382, *Evidence,* Section 334. (Footnote references omitted.)

Although a Hawaii statute allows such questions in civil actions, it is limited by its terms to convictions only, and only for purposes of discrediting the witness. In the case at hand, Plaintiff's counsel was aware by his own admission before the bench (Tr 53) that the Defendant had entered a plea of nolo contendere to the traffic charge, and must also be charged with knowledge that such a plea, as a matter of law, is not a conviction, and cannot be used in any other action than that where the plea was entered.

> "The fundamental rule is that while a plea of nolo contendere may be followed by a sentence, it does not establish the fact of guilt for any other purpose than that of the case to which it applies. The difference between it and a plea of guilty, therefore, is that while the latter is a confession which binds the Defendant in other proceedings, the former has no effect beyond the particular case. Consequently it can not be used against the Defendant as an admission in any civil suit for the same act." 29 Am.Jur.2d 760-761, *Evidence,* Section 702 (Footnote reference omitted.)

Thus the question was an attempt to elicit inadmissible evidence, since the "conviction" requirement of the statute (RLH 222-22) was not fulfilled. In *Bruce v. Leo,* 129 Colo. 129, 267 P.2d 1014 (1954), the Court held:

> "If the plea itself could not be used in any collateral matter, it follows that anything growing out of that plea, such as a sentence, could not be used as a conviction for the plea of itself is deprived of that classification."

Further, since the terms of the statute limit the purpose of introducing such evidence to that of discrediting a witness, the evidence here was not within the statute, since it was material only to prove the facts then before the jury. Plaintiff's counsel, by his own statement in final argument, raised the materiality of this question to his cause.

(Mr. O'Connor):

> "If I for one moment intimated to you that all the Code provisions that the Court is going to read to you are not applicable fully and completely to both parties, then I was in error, because they are. *And that is the foundation of Mr. Chai's case against Mrs. Hymer.*" (Argument—Tr. Add. 74) [Emphasis added.]

If, as Plaintiff's counsel states, the foundation of Plaintiff's claim against the Defendant lies in the violation of statute, then the question propounded by Plaintiff's counsel was clearly for the purpose of infering that fact, not for the purpose of discrediting the witness, and was thus improper and highly prejudicial.

The instruction of the trial court to cure the error could not have been effective, under the circumstances in this case. The question was propounded before the jury, but no answer was heard. The inference was created, and left as an open, unanswered question in the minds of the jurors, thereafter. Under these circumstances, the words of the Court in *Young v. Price*, 48 Haw. 22, 28, 395 P.2d 365 (1964), should apply:

"It must have made a strong impression on the jury when given. It is highly doubtful that the impression, clearly prejudicial to defendants, was dispelled by the instruction to disregard the testimony."

The Court went on to say:

"We feel compelled to state that, even if the incompetent testimony elicited from the plaintiff had been much less detrimental to defendants than it was, we would not, on the trial record of this case, allow the error to stand and thus set a precedent that might be taken as militating against the professional candor which proscribes an attorney from getting evidence before a jury which he knows or should know the court should respect.

"It is our opinion that the circumstances here presented do not permit indulgence in the presumption ordinarily applicable and that, therefore, the trial court's denial of the motion for a mistrial was prejudicial error."

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7. ERROR FOR THE COURT TO FAIL TO CONTROL FINAL ARGUMENTS OF COUNSEL.

In his final arguments, the Plaintiff's counsel called the jury's attention to the failure of the Defendant to introduce certain types of expert witness, when no such experts were introduced by the Plaintiff, or shown by the evidence in the case to exist at all. It is settled law that:

". . . an adverse inference from failure to produce evidence with the corresponding right of

> argument, arises only where a party has introduced evidence; where he has contented himself with relying on the weakness of his adversary's case and has introduced no evidence, the inference and right of argument do not exist." 53 Am.Jur. 381, *Trial,* Section 475.

Despite objection raised by Defendant's counsel, no ruling was made on the objection, nor was a corrective instruction made to the jury, with the result that prejudicial inference was allowed to remain before the jury. In *Skelton v. Beall* (Fla. App. 1961), 133 So.2d 477, 94 A.L.R.2d 820, the Court held:

> "During argument to the jury at the close of the trial, defendant's attorney attempted to comment on the failure of the Plaintiff to bring before the jury the testimony on this one disinterested witness to the accident. The court sustained an objection to such comment because it appeared the evidence was equally available to, and not presented by Defendants.[1] [Footnote 1. Subject to exceptions not applicable here, this is recognized as a correct ruling. 5 ALR 2d 893, 940, 941.]"

In addition, Plaintiff's counsel in his final argument misstated the law with respect to his client's right-of-way at the intersection at the time of the accident. Plaintiff's counsel argued:

> "You know in your own driving that a person who has the right-of-way, if he says, well, I have got the right-of-way but I can go ahead and do anything I want because if we get into an accident, if I get into an accident with a person who

> doesn't have the right of way—or vice versa, if the person who didn't have the right of way said that he could do anything he wanted to do anytime and if he gets into an accident it will be equally the fault of both persons even if the other person is exercising his right of way—wouldn't we be in a heck of a mess in a situation like that? The person who has the right of way has the privilege of exercising it. And I believe that the court is going to instruct you that the right-of-way is the privilege of immediate priority in the use of the roadway."

However, it is the settled law of Hawaii, as pronounced by the court in *Mossman v. Sherman,* 34 Haw. 477, that:

> "It by no means follows, however, that this right of precedence is absolute and can be exercised with impunity under all circumstances regardless of the safety of others, to whom the operator of the vehicle owes the duty of reasonable care." *Mossman v. Sherman, supra,* 481.

Defendant's counsel again objected (Argument—Tr. Add. 74) but the Court failed to rule specifically, and allowed Plaintiff's counsel to continue without issuing corrective instructions.

Thus Plaintiff's counsel brought before the jury, in final argument, two subjects which were not proper argument as a matter of law, and in both cases, despite objections raised, no corrective instructions were issued by the Court. In *Kohlmann v. City of New York,* 8 A.D. 2d 598, 184 N.Y.S. 357, where the Court

ordered a new trial on appeal, the Court held, with respect to conduct of counsel, that:

> "His conduct appears to have been calculated to influence the jury by considerations which were not legitimately before them, and cannot be dismissed as inadvertent, thoughtless or harmless. Parties to a trial, civil or criminal, have a right to have the case determined on the facts and the law applicable thereto. When misconduct of counsel in interrogation or summation so violates the right of the other party to the litigation that extraneous matters beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned."

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8. ERROR IN REFUSING INSTRUCTION ON THE LAW OF EXERCISING RIGHT-OF-WAY.

The instruction requested by the Defendant, No. 18 (R.62) was a correct statement of Hawaii law, taken almost directly from *Mossman v. Sherman, supra:*

> "You are hereby instructed that a right-of-way is not absolute but at all times relative and subject to the fundamental doctrine that a party shall exercise the right so as to avoid any injury to himself and others."

The instruction further expresses the Hawaii law pronounced in *Ferrage v. Honolulu Rapid Transit, supra,* where the Court held:

> "The duty to observe ordinary care requires that the driver of an automobile must anticipate the

possibility of meeting pedestrians and other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision." (Citations omitted).

The Plaintiff put the question of exercise of right-of-way in issue, contending that right-of-way constituted an almost unlimited right to proceed, heedless of the consequences, as argued by Plaintiff's counsel in final argument. The requested instruction was, therefore, essential to the Defendant's case in order to present the issue to the jury of whether the Plaintiff had exercised his alleged right-of-way in accordance with standards prescribed by law.

In the arguments for the Settling of Instructions, Plaintiff's counsel urged and the Court accepted an instruction based on the Hawaii case of *Young v. H. C. & D.,* 34 Haw. 426, as a better statement of law. It was urged then, and is urged now, by the Defendant that *Young v. H. C. & D.* only has application in the instant case to the question of evidence of violation of a statute or ordinance as being evidence of negligence. The *Young* case deals with a fact situation in which no right-of-way question is involved; instead the facts are based on a moving vehicle striking an improperly marked stationary vehicle. The *Mossman* case, cited herein, deals with precisely the question at issue in this case: the right-of-way at a left-hand turn situation in an intersection. In ruling on the instruction the trial court held:

> "I feel that Young v. HC&D goes into this and it is a better statement of the law. What you want to do? Why you feel it is necessary?" (Tr. 535).

Thus, the failure to give the instructions requested in the instant case, together with the final arguments of Plaintiff's counsel may have led the jury to a prejudicial inference of the law of right-of-way which was, in fact, erroneous. Further, the failure to give the Defendant's requested instruction to correctly state the law on the exercise of right-of-way constituted reversible error. In *Hustace v. Davis,* 23 Haw. 606, the Court held:

> "That instruction was accurate, applicable and material to the point it referred to and was not included in the charge given to the court. The refusal to give it constituted error. *Nawelo v. von Hamm Young Co.,* 20 Haw. 644." [sic: 21 Haw. 644]

CONCLUSIONS

The Defendant-Appellant believes that the learned trial court erred in all of the instances set forth in the argument above, and that said errors were highly prejudicial to the Defendant's cause.

The claim for loss of consortium should have been stricken from the pleadings, there being no authority in this jurisdiction for allowing the claim to trial.

Evidence of the Plaintiff's prior manner of driving should have been allowed, together with cross-examination of the Plaintiff's deposition, with whatever limiting instructions necessary, to show the state of mind of the Plaintiff, for testing the credibility of the witness, and for such inferences of the Plaintiff's conduct at the time of the accident as might be reasonably inferred.

The jury's verdict was tainted by the improper communications with the Court Bailiff. Although the effect of the communications cannot now be determined, in the absence of affirmative proof that such communications were harmless, the verdict should not be allowed to stand.

The evidence at trial should not be held to be sufficient to support the jury's verdict, since no more than a mere allegation, with attempted corroboration by an improper question, of violation of a traffic ordinance were presented to support Plaintiff's position. Moreover, sufficient evidence of Plaintiff's negligence was presented to support a contra finding at law. The improper question, together with misstatements of law in final argument, the absence of cross-examination on the Plaintiff's deposition, and the absence of a necessary instruction all compounded to deprive the Defendant of a fair consideration, by the jury, of Defendant's theory of the case. The resulting verdict reflects the compounded prejudices of these errors, and should not be allowed to stand.

The Defendant, therefore, asks that the judgment entered herein in favor of the Plaintiffs be reversed, that judgment be entered in Defendant's favor, or, in the alternative, that the aforesaid judgment be reversed and that the cause be remanded for a new trial.

Dated, Honolulu, Hawaii,
April 11, 1968.

Respectfully submitted,

ALBERT GOULD,
Attorney for Defendant-Appellant.

COBB & GOULD,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ALBERT GOULD